U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042.
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

B5

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 10 2005

EAC 04 256 51920

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology company. It seeks to employ the beneficiary permanently in the United States as a senior system analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The director further determined that the job requirements on the labor certification did not require an advanced degree professional.

On appeal, counsel submits a brief and additional evidence. While we find that the petitioner has overcome the director's concerns regarding the petitioner's ability to pay the proffered wage, the petitioner has not overcome the director's concern that the job does not require an advanced degree professional.

Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 25, 2002. The proffered wage as stated on the Form ETA 750 is $93,371.20 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of February 2003.

On the petition, the petitioner claimed to have been established on July 19, 1999, to have a gross annual income of $373,151, no applicable net annual income and to currently employ five workers. In support of the petition, the petitioner submitted three years of U.S. Income Tax Returns for an S Corporation, Form 1120S.

The tax returns reflect the following information for the following years:

	2001	2002	2003
Net income	$22,153	$12,899	$28,287
Current Assets	$38,437	$7,888	$106,333
Current Liabilities	$1,792	$477	$645
Net current assets	$36,645	$7,411	$105,688

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on February 23, 2005, denied the petition. The director did not contest the petitioner's ability to pay the proffered wage in 2003.

On appeal, counsel asserts that the petitioner paid the beneficiary's predecessor and the beneficiary sufficient funds to establish the petitioner's ability to pay and that the director erred in considering the petitioner's 2001 tax returns as the priority date is in January 2002. The petitioner submits its 2004 tax return reflecting net income of $25,044, current assets worth $129,787, current liabilities of $862, leaving net current assets of $128,925. The petitioner submits evidence that the original beneficiary (the current beneficiary is a substitution for the beneficiary listed on the original labor certification) earned $77,837.90 in 2001 and $102,426.67 in 2002. The petitioner also submits the beneficiary's 2003 and 2004 Forms W-2 reflecting wages of $37,341.07 and $67,900 respectively.

We concur with counsel that the petitioner does not have to establish an ability to pay the proffered wage prior to 2002. Thus, we need not address the financial documents relating to 2001. In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any year. The petitioner did, however, pay the original beneficiary more than the proffered wage in 2002. The petitioner has submitted the initial evidence required by the regulation at 8 C.F.R. § 204.5(g)(2), federal tax returns. Thus, the evidence that the petitioner paid the original beneficiary more than the proffered wage in 2002 is sufficient to establish its ability to pay the proffered wage in that year. As 2002 is the only year contested by the director, the petitioner has overcome this basis of the director's denial.

Requirements of Job Offer

The regulation at 8 C.F.R. § 204.5(k)(4)(i) provides, in pertinent part:

> The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(2) permits the following substitution for an advanced degree:

> A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

It is important that the ETA-750 be read as a whole. Block 14 on the *certified* ETA-750 Part A[1] contained in the record contains the following information:

Block 14 on the ETA-750 Part A contained in the record contains the following information:

Education – College: "4," Degree Required: "Bachelor's *"

Experience – "5" years in job offered or a related occupation.

In this matter, block 14 includes an asterisk. Block 15 includes the following language, separated into paragraphs as it appears in the original:

> * Or equivalent – will accept combination of education and work experience.
>
> Will accept Master's and 2 years of experience in lieu of bachelor's with 5 years experience.

The director concluded that the job did not require a bachelor's degree, but could be substituted with education and experience equivalent to a bachelor's degree. On appeal, counsel asserts that the labor certification "clearly asks for a masters and 2 years of experience which overrides the clarification the [director] is quoting." Counsel references the job description, which counsel describes as "complex" and concludes that if "the whole text is read together, it is evidence that the position offered was of professional level and the qualifications needed for the job were of professional level falling within the 2nd preference category."

The asterisk in Block 14 appears *after the bachelor's degree requirement.* The asterisk in Block 15 appears to continue the education requirement, indicating that a combination of education and experience can substitute *for the bachelor's degree.* The following statement that a Master's degree plus two years is acceptable appears to be a separate statement. Thus, we concur with the director that the education requirements on the labor certification do not require a bachelor's degree or a foreign equivalent degree.

After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, legacy INS specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . .

---

[1] The petitioner also submitted an uncertified labor certification with different educational and experience requirements. As this document was not certified by the Department of Labor, it has no relevance to the actual requirements for the job at issue.

> indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

(Emphasis added.) 56 Fed. Reg. 60897, 60900 (November 29, 1991). As the job does not require at least a bachelor's degree in addition to experience, the petitioner has not demonstrated that the job requires a professional holding an advanced degree.

In the alternative, counsel requests that the petition be considered in a lesser classification. There are no provisions permitting the petitioner to amend the petition on appeal in order to establish eligibility under a lesser classification. Thus, we must dismiss the appeal on this ground alone.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.